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FEB 14 2007
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SUPREME COURT, U.S.

No. 06-531

In the Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL., PETITIONERS

v.

T. A. WYNER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a party who fails to secure any relief on the merits of her claims is nonetheless a "prevailing party," for purposes of eligibility for an award of attorney's fees under 42 U.S.C. 1988(b), because she obtained a preliminary injunction at the beginning of the litigation.

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INTEREST OF THE UNITED STATES

This case concerns the proper construction of the phrase "prevailing party" in establishing eligibility for attorney's fees under 42 U.S.C. 1988(b). The Court's decision will likely govern fee awards not only under Section 1988(b), but also under numerous other fee-shifting statutes. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001). The United States has a substantial interest in the resolution of that question both because meritorious private actions can complement the government's own enforcement efforts under numerous statutes and because the United States itself may be liable for attorney's fees under similarly worded laws, see, *e.g.*, the Equal Access to Justice Act, 28 U.S.C. 2412. The United States has participated as amicus curiae in prior cases involving the proper interpretation of the phrase "prevailing party." See *Buckhannon*, *supra*; *Hewitt* v. *Helms*, 482 U.S. 755 (1987).

STATEMENT

1. Section 1988(b) of Title 42, United States Code, provides, in relevant part:

> In any action or proceeding to enforce a provision of section[] * * * 1983 * * * of this title, * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. a. In mid-January 2003, respondent Wyner informed the park manager for the John D. MacArthur Beach State Park (Beach), that she intended to create a "temporary art installation" at the Beach on February 14, 2003, that would be "comprised of nude bodies in the

form of a peace sign." J.A. 16 ¶ 30. On February 6, 2003, the park manager concluded that "the nudity planned for [Wyner's] activities" was not "expressive conduct protected by the First Amendment," and that the State "has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity * * * is a reasonable manner restriction." J.A. 29; see Pet. App. 27a.[1] Wyner remained "free to conduct [her] activities, absent the nudity." J.A. 29; see Pet. App. 27a.[2]

On February 12, 2003, respondents, Wyner and George Simon, a videographer in Hawaii, filed a com-

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[1] By regulation, Florida law permits park managers to impose reasonable time, place, and manner restrictions on speech within state parks:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. * * * Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

Fla. Admin. Code Ann. R. 62D-2.014(18) (2005).

[2] A Florida regulation bans nudity within the limits of state parks, including its beaches:

> In every area of a park including bathing areas no individual shall expose the human, male or female, genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

Fla Admin. Code Ann. R. 62D-2.014(7)(b) (2005).

plaint against the head of the Florida Department of Environmental Protection and against the park manager in both his official and individual capacities. J.A. 10; Pet. App. 28a. The complaint alleged that Wyner "intends to conduct expressive activity in the future at this park which will include non-erotic displays of nude bodies" and that petitioners' proposed restrictions "chill[] Ms. Wyner's future plans." J.A. 17 ¶ 37. The complaint also asserted that Wyner "desires to engage in expressive conduct on Valentine's Day, February 14, by producing, directing, and participating in the display * * * of nude bodies in the form of a peace sign." *Ibid.* ¶ 34.[3]

The complaint charged that petitioners' proposed enforcement of the ban on nudity at her protest on February 14 would violate the First Amendment. J.A. 18 ¶ 39, ¶ 40. The complaint also charged that the Florida Administrative Code unconstitutionally "vests unfettered discretion upon the Park Manager," *ibid.* ¶ 41, and challenged both that code provision and the ban on nudity on their face and as applied to "expressive conduct at the beach," Pet. App. 3a. The complaint sought (i) injunctive relief against interference with the display on February 14 and "with future expressive activities that may include non-erotic displays of nude human bodies," (ii) declaratory and injunctive relief, and (iii) compensatory, nominal, and punitive damages. J.A. 18-19.

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[3] It is doubtful that respondent Simon has standing because he lives approximately 5000 miles away from the MacArthur Park Beach, and the complaint alleges only that he desired to observe a single display four years ago. See J.A. 12 ¶ 8, 17 ¶ 36; see also *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (standing must exist at every stage of the litigation). There is, however, no dispute that Wyner has standing to maintain this action.

b. The same day that they filed their complaint, respondents filed an "Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction" to prevent petitioners from enforcing the ban on nudity at the "Valentine's Day protest" two days later at the Beach. J.A. 32. Although "disturbed" by the "exceedingly short notice," which had denied the court adequate time to read the relevant case law, J.A. 37, the district court held an emergency hearing the next afternoon. Petitioners participated by telephone, J.A. 36, explaining that "we are pretty [much] on short notice with this and we don't know much of what is going on." J.A. 38.

At the hearing, respondents introduced a number of exhibits that petitioners did not have and could not see. J.A. 53, 55-56. The court overruled petitioners' objections to their introduction "because of the time constraints." J.A. 56. With the caveat that the government officials who were available to participate in the emergency hearing by telephone "are not the people that know the facts all that well," J.A. 68, petitioners put on the testimony of the chief of operations for the Florida Park Service, who testified generally about the process for authorizing displays at the Beach. J.A. 70-78.

After the hearing, the district court granted the preliminary injunction in an oral decision. J.A. 93. The court explained that "I'm not prepared to rule at this point in the proceedings, * * * that the decision was necessarily made with respect to content, but there are a number of aspects about it that are worrisome." *Ibid.* The court also said that "it does appear to me that there are alternatives that would be far less restrictive and could still meet the governmental interests," and the viability of "those avenues can well be explored in this case." J.A. 94. The court further reasoned that the

"loss of First Amendment freedom for even minimal periods of time constitutes irreparable injury." J.A. 95. The court concluded that "the issues are somewhat difficult," and "I don't like to decide issues on this quick a basis, but I do feel like this meets the test of the injunction." *Ibid.*

In a subsequent written opinion, Pet. App. 9a-22a, the court reiterated that its ruling had rested on "the standards applied to a preliminary injunction motion," *id.* at 13a, and that the balance of harms would weigh in favor of permitting the allegedly expressive conduct to go forward, *id.* 15a; see *id.* at 14a. With respect to the "likelihood of success on the merits," *id.* at 19a, the court found that "some of the testimony received at the hearing indicates that content neutrality may not be present," *id.* at 17a, and that there may be "less restrictive alternatives," *id.* at 19a.

Wyner conducted her display on February 14, 2003, without interference from petitioners. Wyner and the other participants, however, did not remain behind the screen that petitioners had set up to shield the public from exposure to the nudity. Pet. App. 4a.

3. The district court subsequently granted summary judgment for petitioners on all claims and dismissed the complaint. Pet. App. 23a-48a. Noting that both parties had now "had an adequate opportunity to develop their arguments" and to make a "complete evidentiary record[ ]," *id.* at 45a, the court first held that petitioners were entitled to impose reasonable time, place, and manner restrictions on nudist expressive activity. *Id.* at 35a-36a. The court further held that the ban on nudity at the Beach was content neutral and furthered the "important and substantial government interest" in "protect[ing] the public from the 'offense' of nudity, and preserves

park aesthetics so that the 'entire park is open to all visitors during operating hours.'" *Id.* at 41a. The court determined that the ban was "no greater than is essential to further the government interest" because authorities had been "unable to ensure that those engaged in the expressive conduct stayed behind the screen," which made "a complete ban on nudity * * * necessary." *Id.* at 41a-42a. With respect to the as-applied challenge, the court denied relief because respondents had failed to identify "any particular facts to which the regulations can be applied," and accordingly treated the claim as only a facial challenge. *Id.* at 47a n.3.[4]

4. The district court granted respondents' application for attorneys' fees for their work obtaining the preliminary injunction. Br. in Opp. App. 1a-13a. The court reasoned that, while respondents had failed to establish any of their claims on the merits, they did succeed in preventing petitioners "from interfering with the temporary art installation planned for February 14, 2003," which the court characterized as "one of the primary purposes for filing this litigation." *Id.* at 3a.

5. The court of appeals affirmed the award of attorney's fees. Pet. App. 1a-8a. The court held that fees were warranted because the preliminary injunction "decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants," *id.* at 3a, and the court made no "mistake of law" in issuing the preliminary injunction, *id.* at 5a. The court accordingly held that respondents were prevailing parties

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[4] Respondents also sought damages, but the district court dismissed those claims on qualified immunity grounds. Pet. App. 29a-32a. Respondents' claim based on the Florida constitution had been dismissed at an earlier stage. J.A. 19 (Count II); J.A. 98.

even though "they were unable to achieve actual success on the merits." *Id.* at 7a-8a n.7.

SUMMARY OF ARGUMENT

Respondents filed a complaint seeking permanent injunctive and declaratory relief, as well as damages, for alleged violations of the federal and state constitutions. At the conclusion of the case, no constitutional violations were found, the defendants' regulations and their implementation were vindicated, and all relief was denied. As a matter of both common sense and precedent, respondents did not prevail; they lost.

That respondents, at the litigation's earliest stage, obtained an emergency and short-lived injunction does not transform them into prevailing parties. "The words 'preliminary' and 'prevailing' are not ones that easily fit together." *Select Milk Producers, Inc.*. v. *Johanns*, 400 F.3d 939, 962 (D. C. Cir. 2005) (Henderson, J., dissenting). A preliminary injunction is, by definition, only preliminary and temporary relief. The injunction was based not on a final resolution of the substantive merits of respondents' claims, but on a balancing of interests and a hurried prediction about the *potential* outcome of the case. The relief afforded respondents was transient and neither survived the conclusion of the litigation nor imposed any enduring, material change in the parties' legal relations. Parties that wish to convert a preliminary injunction into a full-blown merits determination may seek to do so under Federal Rule of Civil Procedure 65(a)(2). But respondents did not make such a request; the time limitations that necessitated informal and truncated proceedings on an undeveloped factual record precluded such conversion; and the district court ultimately

did not embrace respondents' legal position on the merits.

Fundamental fairness precludes imposing fee liability on a fully vindicated defendant for a preliminary proceeding that, by its nature, denied the defendant an adequate opportunity to develop and present the controlling facts and law. Preliminary injunction proceedings frequently involve rushed judgments based on immature records, and the ordinary rules of procedure and evidence do not apply. Plaintiffs, moreover, have substantial control over the timing of requests for preliminary relief, the contours of the relief sought, and many of the critical facts on which the allegations rest. As a result, a defendant's ability to defend its position on the merits at that juncture is often substantially compromised and a hazardous indicator of ultimate success on the merits. What is more, determinations at this stage often turn on issues of irreparable injury, which may be inherently easy to satisfy for certain types of claims, yet may have little relationship to the ultimate likelihood of success on the merits. Nothing in the text of the attorney's fee provision, its legislative history, its purpose, or this Court's precedent suggests that Congress intended to saddle fully vindicated defendants—particularly state governments—with attorney's fees for such interim relief.

ARGUMENT

A PARTY WHO OBTAINS NO RELIEF ON THE MERITS OF ANY OF HER CLAIMS DOES NOT BECOME A PREVAILING PARTY SOLELY BY HAVING OBTAINED A PRELIMINARY INJUNCTION AT THE OUTSET OF THE LITIGATION

Like *Hewitt* v. *Helms*, 482 U.S. 755 (1987), "[t]his case presents the peculiar-sounding question whether a party who litigates to judgment and loses on all of his

claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees," *id.* at 757. As in *Hewitt*, the answer to that question is not peculiar; the answer is "no." "Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760.

The starting point for any claim of eligibility for attorney's fees is the "American Rule" that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Courts generally may not depart from that rule "absent *explicit* statutory authority." *Buckhannon Bd. & Home Care, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (emphasis added). Section 1988(b) contains no direction, explicit or otherwise, that courts should "go[] so far as to force a vindicated defendant," *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983), to pay for the burden of being subjected to an interim constraint by a plaintiff whose claims ultimately proved, upon full examination, to be without merit.

A. Respondents Are Not "Prevailing Parties" Because Fee Liability Depends Critically Upon Merits Liability

This Court has repeatedly admonished that "liability on the merits and responsibility for fees go hand in hand." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985); see *Farrar* v. *Hobby*, 506 U.S. 103, 109 (1992); *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 763 (1989); *Supreme Court of Va.* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 738-739 (1980). Under Section 1988(b), like many other federal fee-shifting statutes, establishing "liability for violation of federal law" is "crucial" to rendering the defendant

responsible for attorney's fees, *Zipes*, 491 U.S. at 762; see *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (presumption in favor of fees in civil rights cases depends critically upon the defendant "violating substantive federal law").

That "crucial connection" to merits liability, *Zipes*, 491 U.S. at 762, is missing in this case. Respondents filed suit and lost. Both counts of their complaint were dismissed. Pet. App. 46a; J.A. 18-20, 98. No constitutional violations were found. Pet. App. 23a-48a. Quite the opposite, the litigation fully vindicated the defendants' policies and practices. *Ibid.* No damages, declaratory judgment, or final injunctive relief was obtained. *Ibid.* In short, respondents did the very opposite of prevailing—they lost. "[W]here a defendant has not been prevailed against, * * * § 1988 does not authorize a fee award against that defendant." *Farrar*, 506 U.S. at 109; see *Hewitt*, 482 U.S. at 760. Only a party that is "legally responsible for relief on the merits * * * [should] bear fee liability," *Graham*, 473 U.S. at 164. Indeed, it would be "quite 'inappropriate'" and "a radical departure from longstanding fee-shifting principles adhered to in a wide range of contexts" for a court "to award the 'loser' an attorney's fee from the 'prevailing litigant.'" *Sierra Club*, 463 U.S. at 683, 684.

The court of appeals carved out an exception to that established rule for cases where a losing plaintiff obtains a preliminary injunction at the outset of the litigation, Pet. App. 2a-5a. That exception, however, lacks any anchor in statutory text, ignores this Court's precedent, and misconstrues the nature of such preliminary rulings.

B. Parties Who Obtain A Preliminary Injunction Do Not Prevail "On The Merits"

In *Buckhannon*, this Court held that a "prevailing party" means a party who had obtained either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." 532 U.S. at 604. Those forms of relief, the Court explained, embody the type of "'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Ibid.* Because there was no consent decree in this case, respondents are only eligible for attorney's fees if their preliminary injunction constituted a "judgment on the merits." It did not because a "judgment on the merits" means final relief on a litigated claim.

1. A party cannot "prevail" without final relief

Requiring a "judgment[] on the merits" gives meaning to the statutory command that only a "prevailing party" can obtain attorney's fees. *Buckhannon*, 532 U.S. at 603-604. "[P]revailing party" is "a legal term of art," that refers to "[a] party in whose favor a judgment is rendered." *Id.* at 603 (quoting *Black's Law Dictionary* 1145 (7th ed. 1999)). Importantly, at the time Congress enacted Section 1988(b), that legal term of art expressly conditioned "prevailing party" status on obtaining a favorable final or dispositive judgment. Only "[t]he party ultimately prevailing when the matter is finally set at rest" is a "prevailing party." *Black's Law Dictionary* 1352 (rev. 4th ed. 1968); see *ibid.* (defining "prevailing party" as the party "who *successfully* prosecutes the action or *successfully* defends against it") (emphases added). Indeed, that legal definition stressed that "prevailing party" status did not turn upon "the degree of success at different stages of the suit," but on

"whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it." *Ibid.*[5]

In granting a preliminary injunction, by contrast, a court does not issue any controlling judgment or "set at rest" the ultimate merits of the parties' legal claims. To the contrary, "[t]he two issues"—appropriateness of a preliminary injunction and resolution of the merits—"are significantly different." *University of Texas* v. *Camenisch*, 451 U.S. 390, 393 (1981). In issuing a preliminary injunction, a court does not decide that the plaintiff is "prevailing," has prevailed, or will prevail. At most, the court makes a prediction about "the likelihood that [the movant] ultimately would prevail," and even that is only one component in the court's multi-factor calculus. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).[6] Irreparable injury is another critical factor, yet satisfaction of that factor often is unrelated to ultimate success on the merits. Indeed, for some claims, like the First Amendment claim made here, courts routinely find that the irreparable injury factor is easily satisfied. See J.A. 95 ("[C]ourts have said that loss of First Amend-

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[5] See also *Black's Law Dictionary* 1069 (5th ed. 1979) (same). That same definition operated at the time Congress enacted the attorney's fee provision of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), on which Section 1988(b) was modeled, *North Carolina Dep't of Transp.* v. *Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 20-21 (1986). See *Black's Law Dictionary* 1412 (3d ed. 1933).

[6] See *Camenisch*, 451 U.S. at 393; see also *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982) (emphasizing the role of the public interest in equitable relief); *John T.* v. *Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003) (preliminary injunction does not support fees "because it is interim relief not based on the merits"); *Smyth* v. *Rivero*, 282 F.3d 268, 276 (4th Cir.), cert. denied, 537 U.S. 825 (2002).

ment freedom for even minimal periods of time constitutes irreparable injury."). What is more, a number of courts have held that, as the risk of irreparable injury increases, the need to demonstrate a likelihood of success decreases, which further widens the gap between actual success and the prediction that occurs at the preliminary injunction stage.[7]

Section 1988(b), however, predicates an award of attorney's fees on *actually "prevailing,"* not on a *prediction* about prevailing, made with variable degrees of confidence by different courts. The court of appeals, in other words, "improperly equate[d] 'likelihood of success' with 'success.'" *Camenisch*, 451 U.S. at 394; see *Doran*, 422 U.S. at 932. Here, the district court expressly rested the injunction on a balancing of interests and an explicitly tentative prediction—with which the court expressed discomfort, J.A. 95—that respondents had a likelihood of success on the merits. Pet. App. 16a-19a; J.A. 93-95. That preliminary evaluation of respondents' claim, moreover, was "not binding" when the dis-

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[7] See, *e.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 970 (1997) (per curiam) (court of appeals required only a "fair chance of success on the merits"); *Louis Vuitton Malletier* v. *Dooney & Bourke, Inc.*, 454 F.3d 108, 113-114 (2d Cir. 2006) ("serious question going to the merits"); *Smyth*, 282 F.3d at 276 ("substantial question"); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229-1230 (6th Cir. 1985) ("serious question"). Courts also consider whether the injunction is mandatory or prohibitory, or whether it would alter or preserve the status quo. Putting aside the inherent challenges in defining and applying such terms, see generally John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978), all of those factors at least offset, if not discount, the role of the likelihood of prevailing in the preliminary injunction analysis. Moreover, some claims by their very nature readily satisfy the irreparable injury factor without reference to how likely it is that the claim is meritless. See J.A. 95.

trict court ultimately decided the case "on the merits," *Camenisch*, 451 U.S. at 395, and thus cannot itself be characterized as a "judgment[] on the merits," *Buckhannon*, 532 U.S. at 604; see *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("[A]ny conclusions reached at the preliminary injunction stage are subject to revision.").

"Congress is free, of course, to revise" Section 1988(b) to make "a substantial likelihood that the party requesting fees would have prevailed" the operative test, *Buckhannon*, 532 U.S. at 622 (Scalia, J., concurring), but it has not done so yet, and certainly has not done so "explicit[ly]," *id.* at 602 (majority op.).[8]

2. Precedent forecloses reliance on interim relief

Consistent with that statutory text, this Court's precedents establish that transitory relief obtained in the course of litigation, which does not survive the conclusion of the case, does not confer "prevailing party" status. In *Rhodes* v. *Stewart*, 488 U.S. 1 (1988) (per curiam), two prisoners obtained declaratory judgments invalidating a prison's magazine subscription policy. *Id.* at 2. They nevertheless were not deemed to be prevailing parties because, at the time those judgments were entered, neither remained in prison, which made the

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[8] Nothing in the legislative history detracts from the plain import of "prevailing." In fact, the cases the legislative history cites as fee-shifting models, see H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976) (citing, *inter alia*, *Bradley* v. *School Bd.*, 416 U.S. 696 (1974); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)); S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (same), involved attorney's fee awards based either on final decisions on the merits, *Bradley*, 416 U.S. at 699 & n.1, 722-724; *Mills*, 396 U.S. at 389-390, or consent decrees, see S. Rep. No. 1011, *supra*, at 5. See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 757 (1980) (per curiam) (discussing significance of *Bradley* and *Mills*).

declaratory relief of no continuing benefit. *Id.* at 4. The Court explained that a judgment "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff" at the time the final judgment is entered. *Ibid.* Where intervening events moot the case "before judgment issue[s]," so that entry of final judgment "afford[s] the plaintiffs no relief whatsoever," *ibid.*, the plaintiffs have not prevailed and thus are ineligible for attorney's fees.

Like the declaratory judgments obtained by the plaintiffs in *Stewart*, the interim relief respondents obtained, which pertained to a single demonstration at a finite time, was mooted by the time judgment was entered in the case. At the end of the case, respondents had obtained no relief that, at that time or going forward, could "affect[] the behavior of the defendant[s] toward the plaintiff[s]." *Stewart*, 488 U.S. at 4. To the contrary, the district court here upheld the Florida regulations in their entirety.

Likewise, in *Hewitt*, the Court held that obtaining a favorable "interlocutory ruling" (a denial of a motion to dismiss) did not accord the plaintiff prevailing party status, because that interim ruling did not endure to final judgment and did not ultimately compel the defendant to give the plaintiff any relief in terms of damages or changed behavior. 482 U.S. at 760-761. Such transient successes—"even legal holdings en route to a final judgment," *id.* at 762—are "not the stuff of which legal victories are made," *id.* at 760.

And again, in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) (per curiam), the Court held that favorable "procedural or evidentiary rulings" that arise in the course of a "disposition on the merits" are "not matters on which a party could 'prevail' for purposes of shifting his

counsel fees to the opposing party," *id.* at 759. Orders with such substantive impact as the reversal of directed verdicts or ordering a case to trial, *id.* at 756, 758, the Court held, will not even permit an *interim* award of attorney's fees, *id.* at 757-758, let alone a final award as a prevailing party. As long as a court or jury "may or may not decide some or all of the issues in favor of the [plaintiffs]," *id.* at 759, the plaintiff has not "established the liability of the opposing party," *id.* at 757, and thus has not "prevailed on the merits of at least some of his claims," and is ineligible for fees, *id.* at 758.

Given that *Hanrahan* precludes even an interim award of fees in advance of a judgment "establish[ing] the liability of the opposing party," 446 U.S. at 757, there is no basis for a final award of fees in a case where liability is completely absent. The preliminary injunction, like the favorable interlocutory rulings obtained by the plaintiffs in *Hewitt* and *Hanrahan*, neither "established the liability" of petitioners nor resolved a claim "on the merits," *Hewitt*, 482 U.S. at 760. Such an interlocutory decree "is not the end but the means," *id.* at 761, of ensuring the orderly resolution of civil litigation and preserving the court's ability to provide effectual relief if the plaintiff prevails. "[A] preliminary injunction is granted to a plaintiff to protect his interests *during the ensuing litigation*." *Withrow* v. *Larkin*, 421 U.S. 35, 43 (1975) (emphasis added).[9]

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[9] See also *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 317 (1999) (characterizing the question whether a preliminary injunction "should have issued when it did" as a "procedural issue" in the litigation); *Camenisch*, 451 U.S. at 395; *Sierra On-Line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) ("A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a device for preserving the status

The preliminary injunction thus serves as a device that courts employ "en route to a final judgment," *Hewitt*, 482 U.S. at 762, but is not itself a final judgment on the merits and it does not "settl[e]" the parties' dispute, *id.* at 761. Section 1988(b) requires, "at a minimum," that a party claiming to have prevailed "be able to point to a *resolution of the dispute* which changes the legal relationship between itself and the defendant, *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis added); see *Farrar*, 506 U.S. at 111. Such resolution is an "absolute limitation" upon fee liability. *Garland*, 489 U.S. at 792.

3. The nature of a preliminary injunction proceeding is inappropriate for taxing attorney's fees

The "significant procedural differences between preliminary and permanent injunctions," *Camenisch*, 451 U.S. at 394, make the issuance of a preliminary injunction a particularly unsound basis for imposing attorney's fee liability. A defining feature of preliminary injunctions is the need for prompt judicial intervention and, as a result, they "are often harried affairs." *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 592 n.5 (1984) (Stevens, J., concurring in the judgment); see *Camenisch*, 451 U.S. at 395. In the case at hand, respondents filed their complaint and motion for a preliminary injunction 48 hours before the planned event, and the district court held a hearing on the application with less than 24 hours remaining. J.A. 36-37. Such time pressures can "deprive[] the defendant of valid defenses," *Hewitt*, 482 U.S. at 762, and can impair presentation of what limited evidence and arguments the de-

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quo and preventing the irreparable loss of rights before judgment.").

fense is able to muster on such short notice, see J.A. 68, 70 (defense unable to assemble the most informed officials for the hearing).

In addition, a preliminary injunction "is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at 395; see *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). Discovery is generally foreclosed, and Seventh Amendment jury trial rights are forgone. In this case, petitioners were forced to participate in the hearing by telephone, and the district court considered documentary evidence that petitioners could not see. J.A. 53, 55-56. Indeed, the preliminary injunction decision in this case arose on such extremely short notice and required such a "hastily arranged hearing" that the proceeding bore more similarity to a hearing for a temporary restraining order than for a preliminary injunction. *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 434 n.7 (1974).

The Federal Rules of Civil Procedure underscore both the risk of error and the tentativeness inherent in the preliminary injunction decision by conditioning the issuance of a preliminary injunction upon "the giving of security * * * for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). That requirement "is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers." *Camenisch*, 451 U.S. at 397.[10]

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[10] Notably, despite the "presumptive rule for costs," *Buckhannon*, 532 U.S. at 606 n.8, there does not appear to be a consistent or historic practice of awarding costs to a party who obtained a preliminary injunction but then lost on the merits. The first federal statute

In short, when a court issues a preliminary injunction, "the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy." *Camenisch*, 451 U.S. at 396. Indeed, the procedures are so truncated that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Id.* at 395; *Brown*, 411 U.S. at 456-457. Fundamental fairness requires that a defendant's liability on the merits or for attorney's fees not be affixed until it has had an adequate opportunity to present its side of the case, both on the facts and the law. Preliminary injunction proceedings simply are not designed to permit the type of thoroughgoing and conclusive consideration of the merits of each party's position needed to justify saddling the defendant with responsibility for attorney's fees—especially a defendant whose position, upon full judicial examination, has been upheld.

For plaintiffs who want an injunction based on the actual merits, Federal Rule of Civil Procedure 65(a)(2) provides an alternative mechanism. That Rule permits a district court to "order the trial of the action on the merits to be advanced and consolidated with the hearing

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regulating the award of costs and fees in federal court specifically limited awards in cases in equity to a "final hearing." Act of Feb. 26, 1853, ch. 80, 10 Stat. 161; see also *Avery* v. *Wilson*, 20 F. 856, 859-860 (C.C. W.D.N.C. 1884) (equity permits costs for a matter "completely disposed of by the court"); *Goodyear Dental Vulcanite Co.* v. *Osgood*, 10 F. Cas. 739 (C.C. D. Mass. 1877) (No. 5594) (applying "final hearing" rule); *Stimpson* v. *Brooks*, 23 F. Cas. 100, 101 (C.C. S.D.N.Y. 1856) (No. 13,454) (denying costs where "[t]he expenses in question accrued on a motion for a preliminary injunction, which was in no way conclusive upon either party as to the merits of the cause. * * * It is the costs on final hearing alone, which are by the statute chargeable.").

on the application" for a preliminary injunction. See also *Camenisch*, 451 U.S. at 395. The Advisory Committee Notes on the 1966 Amendment that added Rule 65(a)(2) express the view that "consolidation can be usefully availed of in many cases," and that, where appropriate, consolidation "should cause no delay in the disposition of the application for the preliminary injunction." That procedure, of course, will not be available when either time pressure or the undeveloped state of the record precludes consolidation, but that simply underscores that the grant of temporary relief under those circumstances was not "on the merits," Fed. R. Civ. P. 65(a)(2), and instead was granted with the understanding that full examination of the merits would follow.[11]

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[11] This case does not squarely present the question whether a preliminary injunction that serves as the catalyst for a permanent change in position by the opposing party renders the plaintiff a prevailing party when, due to mootness, no final judgment on the merits results. However, for many of the reasons stated in both *Buckhannon* and in this brief, there is no basis for carving out a preliminary-injunction exception to *Buckhannon*'s rejection of the catalyst theory. Indeed, the plaintiffs in *Buckhannon* had obtained an interim order, 532 U.S. at 624 (Ginsburg, J., dissenting); Pet. Br. at 3-4 & n.2, *Buckhannon*, *supra* (No. 99-1848), which permitted them to continue operating throughout the litigation, but neither they nor this Court ventured to rest prevailing party status on the combination of an interim order and a catalyst theory. Nor does the legislative history discuss instances of preliminary injunctions serving as catalysts. What does seem clear, however, is that, if the filing of a preliminary injunction request caused a government voluntarily to forgo enforcement of a statute until a permanent injunction hearing could be held, there would be no basis for awarding prevailing party status to the plaintiff who ultimately did not prevail on the merits. There is no greater basis for affording prevailing party status to a plaintiff who, although he obtains temporary relief from the court, ultimately does not prevail on the merits.

C. A Preliminary Injunction Does Not Effect A Material Change In The Parties' Legal Relationship

1. Briefly engaging in desired conduct does not suffice when no enduring relief is granted

The district court held that attorney's fees were warranted because performing the naked peace symbol display was "one of the primary purposes for filing this litigation." Br. in Opp. App. 3a. That is not enough. Prevailing party status depends on more than demonstrating that, after the complaint was filed, the plaintiff "g[ot] his way." *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring). That is because the "coercive effect of litigation on a defendant is by no means entirely dependent on the litigation's having merit." *Palmer* v. *City of Chicago*, 806 F.2d 1316, 1323 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987).

To be sure, respondents differ from the plaintiffs in *Buckhannon* in two respects. First, the statutory change that occurred in *Buckhannon*, 532 U.S. at 601, effected a more concrete, enduring, and far-reaching change in legal rights and obligations than the hours-long temporary adjustment compelled by the preliminary injunction in this case. But that difference, which was still not enough to trigger "prevailing party" status in *Buckhannon*, simply underscores the frailty of respondents' claim that they prevailed in any meaningful sense.

Second, the temporary alteration of circumstances in respondents' favor here, unlike in *Buckhannon*, was the product of a "judicial pronouncement." 532 U.S. at 606. But, as this Court's cases make clear, see Part B, *supra*, it takes more than a single favorable "judicial pronouncement" at the threshold of litigation to confer prevailing party status. Even a party who obtains a *perma-*

nent injunction will not be considered a prevailing party if that injunction is overturned or vacated on appeal, regardless of how much desired conduct that judicial pronouncement makes possible prior to the reversal.[12] Likewise, temporary restraining orders generally permit the requesting party to engage or avoid engaging in conduct, but courts have not rested prevailing party status on that temporary alteration of obligations.

Unquestionably, the preliminary injunction is an important judicial tool, and there is no gainsaying that it may secure highly desired (albeit temporary) relief sought by a party. Here, for example, the injunction permitted respondents to conduct a protest. But "prevailing party" status does not turn upon the practical value of a preliminary injunction to the movant.[13]

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[12] See, *e.g.*, *Pottgen* v. *Missouri State High Sch. Activities Ass'n*, 103 F.3d 720, 723-724 (8th Cir. 1997) ("A plaintiff cannot qualify as a prevailing party if the only basis for his claim of success on the merits is a judgment that has been reversed on appeal."); *Palmer*, 806 F.2d at 1320 ("[W]hen a judgment on which an award of attorney's fees to the prevailing party is based is reversed, the award, of course, falls with it"); cf. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990); *Watson* v. *County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) ("[W]hen the plaintiff scores an early victory by securing a preliminary injunction, then loses on the merits * * * [t]he plaintiff would not be a prevailing party."), cert. denied, 538 U.S. 923 (2003); *NAACP* v. *Detroit Police Officers Ass'n*, 46 F.3d 528, 529-530 (6th Cir. 1995); *Smith* v. *University of N.C.*, 632 F.2d 316, 352 (4th Cir. 1980) ("[J]ust because an injunction was issued properly does not signify that a defendant must incur the costs of its issuance when a court has eventually proclaimed him to be innocent of discriminatory conduct.").

[13] Of course, while the ability to go forward with the immediate protest may have been highly desired by respondents, that event also offered additional proof that the suggested less restrictive alternatives were not, in fact, effective.

More is needed and, because "fee liability runs with merits liability," *Graham*, 473 U.S. at 168, a favorable final—not interim—resolution of at least one of the plaintiff's claims is what Section 1988(b) requires. Unless and until the trier of fact "decide[s] some or all of the issues in favor of the respondents[,] * * * it could not seriously be contended that the respondents had prevailed." *Hanrahan*, 446 U.S. at 759. A plaintiff must "establish[] the liability of the opposing party" and must "prevail[] on the merits of at least some of his claims[,] [f]or only in that event has there been a determination of the 'substantial rights of the parties.'" *Id.* at 757-758.

In other words, "the plaintiff must be able to point to a *resolution* of the dispute which changes the legal relationship" between the parties, and it is that "material alteration of the legal relationship" that is the "touchstone of the prevailing party inquiry." *Garland*, 489 U.S. at 792-793 (emphasis added); see *Farrar*, 506 U.S. at 111. Indeed, *Bradley* v. *School Board*, 416 U.S. 696 (1974), which the legislative history of Section 1988(b) points to as a model for fee awards, see note 8, *supra*, held that "the existence of a final order [is] a prerequisite to the award," *id.* at 722. Achieving a desired benefit is not enough, see *Buckhannon*, *supra*; that achievement must be the product of actually succeeding on the merits of a claim, see *Garland*, 489 U.S. at 791-792; *Stewart*, 488 U.S. at 4.

That rule makes sense because the logical predicate for making a defendant finance the lawsuit filed against it is a determination that the defendant wrongfully violated federal law, and thus that the defendant should pay the cost of bringing its conduct into conformity with the law. But a preliminary injunction makes no definitive or conclusive finding about compliance with federal

law and, in fact, the enjoined defendant may be fully vindicated in the ensuing litigation.

Here, no violation of federal law was proven in court, and the defendants' conduct did not prompt a consent decree imposing a permanent, judicially sanctioned change in the parties' legal relations. Petitioners, in other words, did not "violate[] federal law," *Martin*, 546 U.S. at 137, and they "have not been found to have violated anyone's civil rights," *Zipes*, 491 U.S. at 762. Nothing in common sense, or the text, history, or purposes of Section 1988(b), or in "long-standing fee-shifting principles adhered to in a wide range of contexts" countenances "go[ing] so far as to force a vindicated defendant to pay the plaintiff's legal expenses," *Sierra Club*, 463 U.S. at 683, 685. The plaintiffs "left the courthouse emptyhanded," *Buckhannon*, 532 U.S. at 614 (Scalia, J., concurring), and "people who bring losing suits must bear their own attorneys' fees," *Palmer*, 806 F.2d at 1323.[14]

2. No as-applied challenge was resolved

Respondents cannot avoid that result by labeling the preliminary injunction proceeding an "as-applied" challenge to state law. See Pet. App. 3a; Br. in Opp. App. 4a. First, whether the underlying challenge was facial or as-applied does not change the fundamentally temporary

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[14] While a consent decree does not always include a formal admission of liability, the decree remains a final and enduring "court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant,'" *Buckhannon*, 532 U.S. at 604; see *id.* at 618 (Scalia, J., concurring) ("[I]n the case of court-approved settlements and consent decrees, * * * [t]here is at lest *some* basis for saying that the party favored by the settlement or decree prevailed *in the suit*"). A preliminary injunction does not impose a similarly final determination of or enduring change in legal relations.

and non-conclusive character of the court's preliminary injunction ruling.

Second, a preliminary injunction that, as a practical matter, avoids having the statute applied to a particular event does not amount to a successful as-applied challenge to the *statute*. The latter requires a permanent injunction or other final relief on the merits. To ensure that the preliminary injunction proceeding resolved their as-applied challenge on the merits, respondents could have moved to consolidate the preliminary injunction hearing with the trial on the merits, see Fed. R. Civ. P. 65(a)(2). But they did not, choosing instead to seek temporary relief under the more forgiving likelihood-of-success-on-the-merits standard. Having enjoyed the benefits of that tactical decision, respondents cannot, after the fact, claim attorney's fees on the supposition that the injunction established actual, rather than predicted, liability on the merits.[15]

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[15] As a procedural matter, the record indicates that the February 14, 2003, event was a single manifestation, rather than the sum total, of the as-applied challenge. The complaint specifically alleged respondent Wyner's intention to engage in similar displays in the future, J.A. 17 ¶ 37, and, indeed, without such an allegation, Wyner would have lacked standing after February 14 to press the case forward. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). The respondents' challenge to the bathing suit regulation, moreover, appears to have been exclusively a challenge to the regulation as applied to expressive activity at MacArthur Beach. Pet. App. 3a. Respondents never argued, for example, that the bathing suit regulation was unconstitutional as applied to beachgoers who opposed wearing suits because of tan lines, rather than because of a desire to engage in expressive activity. Finally, respondents continued to press their as-applied challenges at the summary judgment stage, *id.* at 47a n.3, and lost that claim due to a failure of proof of any particular facts to which the regulations could be applied, *ibid.*

Nor is petitioners' decision not to appeal the preliminary injunction of relevance. Whether appealed or not, the preliminary injunction remained preliminary and could only have been reviewed as such, see *Camenisch*, 451 U.S. at 393-396.[16] Indeed, assuming an appeal could have been resolved in time to avoid mootness, the court of appeals would have reviewed the district court's balancing of equitable factors, including the likelihood of success, under an abuse-of-discretion standard of review, thereby compounding the gap between the preliminary injunction decision and the actual merits of the claim. See *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

Moreover, here, as is often the case when fees are sought under Section 1988(b) for equitable relief, the defendants are state officials charged with making litigation judgments in the public interest. Cf. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Given the precipitate timing of the injunction, state officials should not be penalized for concluding that compliance with the court's short-lived order would reflect a better application of governmental resources than seeking a highly disruptive emergency appeal that would have had to have been briefed and resolved within hours. Congress did not enact the attorney's fee statutes to proliferate the number of highly time-sensitive interlocutory appeals taken by governments for the sole purpose of protecting the public fisc from attorney's fee liability.

Finally, in permitting fees, the D.C. Circuit has stressed that a preliminary injunction is an independent and appealable "judgment" that accords favorable relief

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[16] See *Doran*, 422 U.S. at 932; cf. *United States* v. *United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198-199 (1950) (failure to appeal temporary injunction does not make it law of the case).

to the movant. *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 949 (2005). That is true, but beside the point. Denials of sovereign and qualified immunity and certifications of class actions are also appealable,[17] but would not support an award of fees in the absence of a final favorable judgment on the merits. Fee liability requires not just a judgment, but a "judgment on the merits," *e.g.*, *Buckhannon*, 532 U.S. at 605, which a preliminary injunction is not. See *Select Milk*, 400 F.3d at 955-957 (Henderson, J., dissenting).[18]

3. No substantive legal issue was decided

The court of appeals granted prevailing party status because (i) "the preliminary injunction * * * decided a substantive issue—whether or not the state officials could arrest the nude peace symbol participants," and (ii) the injunction was not "based on a mistake of law." Pet. App. 2a-3a. Both grounds are flawed.

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[17] See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); Fed. R. Civ. P. 23(f); cf. 28 U.S.C. 1292(b).

[18] For the same reason, the fact that a preliminary injunction is enforceable through contempt does not render it a ruling on the merits. Contempt is simply a mechanism to enforce judicial orders that, like many judicial sanctions, "depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 53 (1991). A "Contempt Order can be neither less 'interim' nor more 'merits-based' than the Preliminary Injunction itself." *John T.*, 318 F.3d at 559. Contempt proceedings, in fact, vindicate the court's authority, not the merits of the plaintiff's claims, and "are not [even] a part of the original cause." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911); see *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). And, of course, contempt is available to enforce a permanent injunction that is not stayed while the appeal is pending, but that does not entitle the plaintiff to attorney's fees if the injunction is reversed on appeal.

First, the preliminary injunction plainly did not "decide[] * * * on the merits," Pet. App. 3a, that state officials cannot arrest nude peace symbol participants. The summary judgment decision specifically held that officials can constitutionally enforce the ban on such demonstrations. *Id.* at 41a-45a. With respect to the February 14 demonstration , the district court was explicit that the preliminary injunction did *not* rest upon a final decision on the merits of the constitutional question, *id.* at 14a-15a, 19a, concluding that "I don't like to try to decide[] issues on this quick a basis, but I do feel like this meets the test of the injunction," J.A. 95.

In fact, the district court itself twice explained that the "driving force behind" its issuance of the preliminary injunction, Pet. App. 47a n.2; Br. in Opp. App. 4a n.2, was that it "perceived" a risk of discrimination based on Wyner's political message, *ibid.* That theory, however, had never been advanced by respondents in their pleadings, and arose entirely from the hurried telephonic testimony at the emergency hearing of a state official who did not "know the facts all that well." J.A. 68; see J.A. 70, 74. That concern completely evaporated upon examination at the summary judgment stage, after the parties had time to compile a proper evidentiary record and to develop their legal arguments fully, and after the court was afforded adequate time for deliberation on the constitutional questions presented. Thus, the record refutes the court of appeals' conclusion that the preliminary injunction proceeding resolved any substantive issue of law "on the merits."

Second, the court of appeals' emphasis (Pet. App. 3a-5a) on the absence of a mistake of law in the district court's preliminary injunction ruling misses the mark. Whether or not the district court applied the correct

legal test does not change the fundamentally tentative and qualified nature of its hurried examination of each parties' position and the competing equitable interests. At most, the existence of critical legal error would provide a *second* reason why the preliminary injunction did not support prevailing party status. But the issue for attorney's fee purposes is not whether the preliminary injunction should have issued; the relevant question is only whether the plaintiff prevailed on the merits.

The court's decision also overlooks that, in many cases, the legal rules are established and it is the proof of facts that makes all the difference. However, at the embryonic stage at which most preliminary injunction proceedings occur, factual development is nascent, and the "[d]ecisive facts may not emerge until discovery or trial." *Christiansburg Garment Co* v. *EEOC*, 434 U.S. 412, 422 (1978). That dearth of facts can be particularly debilitating to the defendant, who generally has little control over both the timing and the factual framework in which a preliminary injunction motion is presented and decided. The imbalance also exacts a toll on courts confronted with sensitive First Amendment questions. "The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate," and that problem is exacerbated when emergency relief deprives the court of "balanced analysis" and the time for "careful conclusions." *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). Furthering the imbalance, courts generally find that First Amendment claims, without regard to the merits, inherently satisfy the irreparable injury requirement, see J.A. 95, which in many circuits goes a long way to ensuring that temporary relief issues.

In this case, the preliminary injunction rested critically upon two mistakes of fact—the district court's perception of discrimination based on political content, Pet. App. 47a n.2; Br. in Opp. App. 4a n.2, and the court's assumption that less restrictive alternatives were available because respondent Wyner would perform behind a cloth barrier, Pet. App. 4a. Without the time pressures of the emergency motion and with the benefit of a developed record, both of those factual assumptions were proven to be incorrect. Nothing in the purposes of the attorney's fee provision, this Court's precedent, or logic justifies having prevailing party status turn upon whether it was a hurried-but-mistaken decision of law or a hurried-but-mistaken decision of fact that resulted in a now-vindicated defendant being temporarily enjoined at the outset of the case. What is critical is that the plaintiffs did not prevail on the merits; why they lost is largely beside the point.

CONCLUSION

The judgment of the court of appeals should be reversed.

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FEBRUARY 2007